

No. 22126

In the

United States Court of Appeals

For the Ninth Circuit

THE STATE OF CALIFORNIA, Acting by and
through the DEPARTMENT OF WATER
RESOURCES,

Appellant,

vs.

THE ORVILLE WYANDOTTE IRRIGATION DIS-
TRICT, an irrigation district, and the
CALIFORNIA PUBLIC UTILITIES COM-
MISSION, a public commission,

Appellees.

Brief of Appellee California Public Utilities Commission

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STATEMENT OF THE CASE

On October 14, 1966, appellee-Oroville-Wyandotte Irrigation District (OWID) filed an application (Ex. C. to DWR First Amended Complaint, CT 68-72) before the Appellee-California Public Utilities Commission (CPUC) pursuant to Sections 11590-11592 of the California Water Code in which it sought a determination of the obligation, if any, of the Department of Water Resources (DWR), an agency

of the State of California, with respect to the replacement or relocation of OWID's facilities to be taken or destroyed by DWR in the course of the latter's development of the Feather River Project in California. DWR moved to dismiss OWID's application (CT 88-102), which the CPUC denied by order on March 28, 1967 (CT 281-284). Hearings were thereafter held by CPUC on OWID's application, but no final determination has been made as of this date by CPUC.

Even prior to CPUC's order denying DWR's motion DWR commenced the instant action in the United States District Court in which it sought to restrain CPUC from proceeding to entertain OWID's application, and to obtain a declaration that CPUC had no jurisdiction over the subject of OWID's application. CPUC and OWID moved to dismiss this action in the Court below and DWR filed motions for summary judgment and additional injunctive relief. The District Court denied DWR's motion for injunctive relief and granted the motions to dismiss. Further motions by DWR to enjoin CPUC hearings pending the instant appeal were denied by the District Court and this Court.

SUMMARY OF THE ARGUMENT

CPUC believes that it, as a constitutional and statutory agency of the State of California, has an obligation and duty to proceed and hear OWID's application and render a determination thereon pursuant to Sections 11590-11592 of the California Water Code. CPUC also believes that there is no conflict between said Sections 11590-11592 and OWID's application thereunder, and any provision of the Federal Power Act. CPUC also urges that DWR's action

in the court below was and is premature since CPUC has not made any final determination adverse to DWR and that DWR has plain, adequate and speedy remedies at law to review any final determination of CPUC. Additionally, considerations of comity, as well as the possible bar of the Eleventh Amendment, require that there be no interference with the CPUC proceeding by the federal courts prior to a final state administrative and judicial determination in the CPUC proceeding.

ARGUMENT

CPUC Has a Duty to Proceed to Hear and Determine OWID's Application; Therefore, the District Court Properly Granted Appellees' Motion to Dismiss.

Article XII, Section 23 of the California Constitution provides in part:

“. . . (CPUC) shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the (CPUC) respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . .”

The California Legislature has enacted Sections 11590, 11591 and 11592 of the Water Code of the State of California, which delegate to the Commission the authority and duty to make a determination of the obligation, if any, of DWR, an agency of the State of California, to replace or relocate the facilities of another state agency or public utility taken or damaged by DWR in the development of one of its projects. This is a duty delegated to CPUC which

no other California or federal agency can perform for it. OWID has filed an application pursuant to said Sections 11590-11592 and CPUC is thus under a duty and should be allowed to proceed to make the determination contemplated by the California Legislature.

There is no basis alleged, or in fact, for the District Court (or this Court) to have restrained the CPUC proceeding. DWR has not shown "any threatened or probable act of the (appellees) which might cause the irreparable injury essential to equitable relief by injunction." (*Public Serv. Comm. v. Wycoff*, 344 U.S. 237, 241.) A court of equity will not enjoin the mere holding of an administrative hearing. (*Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496; *McDevitt v. Gunn*, 182 F. Supp. 335; *Reinick v. Loper*, 77 F. Supp. 333.)

CPUC does not threaten any action that would interfere with DWR's Feather River Project. Its proceeding to make a determination on OWID's application is a lawful exercise of its jurisdiction and does not conflict with any other law.

2. There Is No Conflict Between the CPUC Proceeding and any Provision of the Federal Power Act.

Sections 11590-11592 of the California Water Code are part of a statutory scheme which also provides for the existence of DWR. These sections are intended to protect other state agencies and local state utilities, and those citizens dependent on their services, affected in the course of DWR projects. These California provisions are entirely compatible with the Federal Power Act.

DWR relies upon the Federal Power Act to invoke federal jurisdiction. But the Federal Power Act does not create or eliminate liability nor does it prescribe a forum for adjudication of liability; it merely preserves existing

remedies against licensees. (16 U.S.C. Sec. 803 (c).) Indeed, with regard to matters like the present one which are concerned with assuring water for irrigation and domestic purposes, the Federal Power Act specifically states:

“Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.” (16 U.S.C. Sec. 821.)

Furthermore, DWR’s action is grounded upon the theory that OWID is seeking enforcement of rights and duties arising under the Federal Power Act. Upon the facts, this is clearly erroneous. The action of OWID, in its application to CPUC, is strictly based upon the Sections 11590-11592 of the California Water Code. Consequently, there is no justiciable controversy capable of judicial determination regarding the application of OWID. Any determination of the effect of an application predicated on the Federal Power Act would be upon a hypothetical state of facts. (*Aetna Life Insurance Co. v. Haworth*, 300 U.S. 827.)

Given the true facts about OWID’s application, Title 16, U.S.C. Section 825p upon which DWR relies, is not applicable as the application does not rest upon any duty, liability, rule, regulation or order under the Federal Power Act. OWID is seeking rights under the California Water Code. The provisions of the Federal Power Act have been invoked only by DWR and only as defenses to OWID’s claim. Such defenses are not a proper basis for federal court intervention and jurisdiction. (*Public Serv. Comm. v. Wycoff*, *supra*, 344 U.S. 237; *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667.)

In support of its contention that the matter is within the purview of federal law, DWR relies primarily on *First-Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152. This case is clearly distinguishable from the present situation. In the *First-Iowa* case, a state statute required approval of the state prior to commencement of work on a dam and electric project. The applicant in that case sought a license from the Federal Power Commission (FPC) and the state contended that the licensee must also show compliance with the state laws regarding construction of the dam and power site, prior to obtaining a permit from the FPC. The Court held that the Federal Power Act did in that instance supersede the state law as it was clearly in direct conflict with the FPC action and provisions of the Federal Power Act. Here, there is no conflict or interference with the Federal Power Act or the FPC. Any action taken by CPUC would merely determine who has the obligation under the California Water Code with respect to the relocation of certain of OWID's facilities. However, there is nothing in OWID's application before the CPUC, nor any suggestion of any prospective action of the CPUC, that either OWID seeks, or the CPUC intends to interfere with any FPC action or Federal Power Act statute.

3. CPUC Has Not Made a Final Determination; DWR's Contentions Are Premature, Its Rights Protected by Adequate Judicial Remedies.

CPUC has not made a final determination of OWID's application. When such a determination is made, if DWR considers its rights to have been adversely affected, DWR will have adequate remedies at law to raise any jurisdictional arguments, namely, by petition for rehearing before CPUC and then by petition for review directly to

the California Supreme Court. (Section 1731, *et seq.* and 1756, *et seq.*, Calif. Pub. Util. Code.) DWR, if still dissatisfied, may then directly seek review before the United States Supreme Court. (28 U.S.C. Sec. 1257.)

4. The District Court's Action Should Also Be Sustained on Grounds of Comity.

DWR seeks in the instant proceeding to restrain a constitutionally created agency of the State of California from performing its lawful function. As we have seen, CPUC has not as yet made a final determination on OWID's application. DWR has plain, adequate and speedy judicial remedies to test the validity of any CPUC decision in the California Supreme Court. On this basis, the exercise of federal jurisdiction, even if applicable, should be withheld on consideration of comity since California law provides for judicial review of any CPUC order and for its stay pending review. (*Alabama Pub. Serv. Com. v. Southern R. Co.*, 341 U.S. 341.)

Furthermore, the fact that the action is against agencies of the State of California also raises the bar of the Eleventh Amendment. The language of that amendment prohibits federal court suits brought against a state by citizens of another state, but it has been construed to prohibit federal court suits against a state brought by citizens against the state of which they are citizens as well. (*Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 186; *Hans v. Louisiana*, 134 U.S. 1; *Fitts v. McGhee*, 172 U.S. 516, 524-25; *North Carolina v. Temple*, 134 U.S. 22, 30.) *A fortiori*, it prohibits suits by one state agency against a sister state agency.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: April 22, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

TIMOTHY E. TREACY